

After recording return to:

GRANTOR: Columbia & Eighth, LLC  
GRANTEE: City of Seattle  
LEGAL:  
ASSESSOR'S PARCEL NUMBERS: 859040 0880  
859040 0885, 859040 0900

**EASEMENT AGREEMENT FOR OPEN SPACE,  
RECREATIONAL USE AND ACCESS BY THE PUBLIC**

THIS EASEMENT AGREEMENT FOR OPEN SPACE, RECREATIONAL USE AND ACCESS BY THE PUBLIC (this "**Easement Agreement**") is made as of \_\_\_\_\_, 2013 (the "**Effective Date**"), by and between Columbia & Eighth, LLC, a limited liability company ("**Developer**"), and The City of Seattle, a Washington Charter City (the "**City**").

**RECITALS**

A. Developer is owner of the real property described in Exhibit A attached hereto and incorporated herein by this reference (the "**Developer Property**"), which Developer intends to develop with a multifamily development or other project (the "**Project**"). The Project Master Use Permit has been approved by the City Department of Planning and Development ("DPD") under Project No. 3013479 (the "Project Permit", as it may hereafter be amended).

B. Developer desires to provide neighborhood open space (as defined in Chapter 23.58A of the Seattle Municipal Code ("**SMC**")) on the Developer Property to qualify the Project for bonus floor area. Developer intends to build an underground garage and related improvements on the Developer Property (the "**Garage**") and to provide the neighborhood open space ("**Open Space**") on the surface of the Developer Property directly above the Garage.

C. Developer has worked with the City Department of Parks and Recreation ("Parks") on the design of the Open Space and has increased the total area of the Open Space by approximately 24% above the area required under Chapter 23.58A.040 of the SMC to qualify for additional development rights.

## **AGREEMENT**

For in and in consideration of good and valuable consideration, receipt of which is acknowledged, the City and Developer agree as follows:

### **1. Public Easement.**

1.1. Grant of Open Space Easement. Developer hereby grants, dedicates and conveys to the City, its successors and assigns, as a covenant running with the land, an easement (the "**Public Easement**") for the purposes described below, subject to the terms and conditions set forth herein, on, over, across and above the surface of that portion of the Developer Property legally described on Exhibit B (the "**Easement Area**"). "Surface" means the finished surface of the Easement Area following construction of the Open Space Improvements, as defined below. The Easement Area does not include any portion of the Garage or other subsurface areas of the Developer Property or any portion of the Project. Public use of the Easement Area may commence upon completion of the Open Space Improvements, but not before.

1.2. Purposes. Subject to the conditions set forth herein, the Public Easement is granted for open space, landscape, recreation, pedestrian and recreational use and access.

1.3. Limitations on Public Access. Prior to completion of the Open Space Improvements by the Developer as set forth in Section 2 below, access to the Easement Area shall be limited to Developer, and its agents, employees, consultants and contractors. Further the right of the general public to use Easement Area shall be prohibited until completion of construction of the Garage and the Project and the Open Space Improvements and shall thereafter be limited as reasonably required for the safe exercise of Developer's repair, reconstruction or redevelopment rights as provided in Subsection 1.5 below. After the Open Space Improvements are completed by the Developer, and except when the Easement Area may be closed to public use as provided herein, the Easement Area will open to the general public during daylight hours, without charge, during reasonable and predictable hours, for a minimum of ten (10) hours each day of the year between October and April and twelve (12) hours each day of the year between May and September ("Public Access Hours").

1.4. Use of the Easement Area. Use of the Easement Area by the general public during Public Access Hours shall at all times be subject to Chapter 18.12 of the SMC (Parks Code), together with rules promulgated by the Superintendent of Parks and Recreation (the "Parks Regulations"). In addition, the following activities are prohibited in the Easement Area during Public Access

Hours: camping; pets off-leash; smoking; carrying handguns or weapons; violation of any law or regulation, including Parks Regulations; posting of signs or notices; possession of alcoholic beverages; urinating or defecating; use of amplified sound; maintaining a fire; damage or vandalism to any Open Space Improvements or the Project; abusive or harassing behavior; driving a vehicle; possession of illegal drugs; sexual activities or misconduct; assault or fighting; use of on-site water or electricity by the public and any other activity which may result in injury to persons or damage to property, which unreasonably interferes with the enjoyment of the Open Space by others or which obstructs access to the Open Space or the Project (individually, "Prohibited Activity", and collectively, the "Prohibited Activities"). With the exception of Prohibited Activities, the public may engage in activities allowed in the public sidewalk environment, including free speech activities, unless such activities would require a street use permit if conducted on the sidewalk. Developer reserves the right to take such action as Developer deems necessary or advisable under the circumstances to prevent, respond to or terminate any Prohibited Activity, including without limitation the eviction of individuals from the Easement Area or the temporary closure of the Easement Area.

1.5. Developer's Reserved Use of the Easement Area. Developer reserves (a) the use of the airspace in and above the Easement Area for the purpose of crane swing and for other purposes associated with the construction and operation of the Project, and (b) the use of the surface and subsurface of the Easement Area as required for the construction, maintenance, repair, reconstruction and redevelopment of the Project, the Open Space Improvements and the Garage. In addition, Developer may install, use, maintain and repair limited improvements on the surface of the Easement Area as reasonably necessary to operate the Garage and/or the Project, provided that such improvements are approved by Parks as not substantially interfering with the public use and enjoyment of the Easement Area as Open Space as provided herein. Partial or complete closure of the Easement Area by the Developer may be reasonably required for Developer to complete any work permitted under this Subsection 1.5 or for maintenance and/or repair required under Subsection 1.6 below. Such period of closure shall be limited to the period reasonably necessary to complete the required work.

1.6. Maintenance and Repair. Following completion of the Open Space Improvements (defined below), the Developer shall provide, at its sole expense, all maintenance and repair services for the Open Space Improvements, including the cost of all utilities associated with operation of the Open Space Improvements. The Easement Area and Open Space Improvements shall be maintained in a clean, attractive and safe condition, substantially similar to the condition of the original installation, with allowance for reasonable wear and tear prior to replacement of the Open Space Improvements. All repairs to and replacement of the Open Space Improvements shall be conducted promptly and with materials of like kind and quality to the original.

1.7 Developer's Use of the Easement Area. Developer, occupants of the Project, and their respective agents and guests, have the same rights to use

the Easement Area as the general public during Public Access Hours and may also use the Easement Area during hours when it is not open to the general public as described in Subsection 1.3 above.

1.8 No Construction by City in the Easement Area. Nothing herein shall authorize the City to undertake any construction or modification of the Easement Area or install any fixtures, landscaping or improvements in the Easement Area.

## **2. Open Space Improvements; Casualty.**

2.1. Open Space Improvements. Following completion of construction of the Garage, Developer will complete certain improvements to the Easement Area ("Open Space Improvements") as generally described on Exhibit C attached hereto, at Developer's cost. Following completion of the Open Space Improvements, the parties will execute and record an amendment to this Easement Agreement that replaces Exhibit B with an exhibit reflecting the as-built legal description of the Easement Area. The parties agree that the Open Space Improvements reflected on Exhibit C are satisfactory to provide usable Open Space on the Easement Area. Any material deviation from the design on Exhibit C, including the possible addition of low and movable gates and fencing, shall be subject to the reasonable approval of DPD and Parks, considering the use of the Easement Area as Neighborhood Open Space. Upon approval of a design change, the parties will execute and record an amendment to this Easement Agreement that replaces Exhibit C with an exhibit reflecting the revised approved design.

2.2 Casualty. In the event of material damage or other casualty to the Project, such that a material portion of the Project is rendered unusable, and Developer determines in its sole discretion that it does not intend to restore or reconstruct the Project as originally developed, this Easement Agreement shall terminate immediately upon notice thereof from Developer to the City.

## **3. Project Permitting Issues**

3.1. No Build Reservation. Title 22 SMC establishes certain minimum standards for fire protection, including requirements for fire resistance of building walls and for protection or prohibition of unprotected openings such as windows and doors, and minimum distances which buildings must be set back from property lines and other structures regulated by City Code as an alternative option (the "Fire Protection Standards"). The Project will be designed to include unprotected openings in the façade of the Project immediately adjacent to the north boundary of the Easement Area. In order to permit such unprotected openings, the Fire Protection Standards require that the area within twenty feet of those unprotected openings remains free of other structures. Developer hereby reserves, for the benefit of the Developer Property, a non-exclusive perpetual no-build area over the land described on Exhibit D (the "**No-Build Area**"). No

structures of any kind shall be constructed or maintained in the No Build Area if such structures would modify the treatment of the Project under the Fire Protection Standards, provided that landscaping features are permitted in the No-Build Area. The No-Build Area reservation shall benefit the Developer Property, and shall be appurtenant thereto.

3.2 Open Space Requirements. Parks acknowledges that it is the intent of Developer to utilize the Easement Area to qualify as "neighborhood open space" under the applicable provisions of the City's Land Use Code (Title 23 SMC or as subsequently codified), in order to qualify the Project for additional height and/or floor area. Parks shall reasonably cooperate with the Developer, including agreeing to reasonable modifications to the design of the Open Space Improvements if requested or required by DPD to qualify the Project for such additional height and/or floor area.

**4. Termination.** If the permit approvals for the Project expire or are otherwise terminated by the Developer or DPD without the Project having been completed for occupancy, then this Easement Agreement shall automatically terminate without further action by either party. Otherwise, the Easement Agreement shall remain in full force and effect for the life of the Project following its completion. Amendments to the Land Use Code (Title 23 SMC or as subsequently codified) or modifications of the Project Permit shall not impair or reduce the rights of the City under this Easement Agreement, without the prior written consent of the City.

**5. No Impairment and/or Commitment of City's Regulatory Discretion.** Nothing in this Easement Agreement shall be interpreted to limit the exercise by the City or any other governmental agencies of their regulatory powers with respect to any of the land use approvals referenced herein in accordance with applicable law. This Easement Agreement shall not be interpreted as an agreement or commitment to approve any or all of the land use approvals, or any commitment whatsoever by the City with respect to any present or future City discretionary decisions that may be required for the land use approvals. The City's approval of plans and specifications as required by this Easement Agreement (as opposed to actions on permits or other land use approvals taken in the City's regulatory capacity) shall not constitute any representation by the City that such plans and specifications are adequate for the purpose intended or comply with applicable laws, rules, regulations, ordinances or governmental requirements.

**6. Force Majeure.** Neither party hereto shall have any liability to the other for its failure to fulfill any of its performance obligations hereunder that are materially delayed, hampered, interrupted or interfered with or otherwise become impossible or impracticable by reason of any act of God, fire, earthquake, flood, explosion, strike, labor disturbance, civil commotion, act of government, any order, regulations, ruling or action of any labor union or association of artists or employees affecting the parties or the industry in which it is or they are engaged, any shortage of failure or delays in the delivery of materials, supplies, labor or equipment or any other cause (other than financial or market conditions) beyond the control of the parties. The performance of this Easement Agreement shall be suspended during the continuation of such condition and shall resume forthwith after the termination of such condition.

**7. Enforcement.** The public right of pedestrian and recreational access and use established hereunder shall also be subject to the limitations of any applicable rules or regulations adopted by the City, now and in the future; provided such rules or regulations shall not modify any terms of this Easement Agreement. The obligations of Developer under this Easement Agreement shall be enforceable exclusively by the City (including by Parks), and the City shall have, in addition to all available remedies, rights of access to the Easement Area for purposes of enforcing the rights of the public granted herein.

**8. Defaults.**

8.1. **Remedies.** If either party fails to perform its obligations when due under this Easement Agreement, such party shall be in default. The non-defaulting party shall have the right to all remedies normally available at law or in equity for such a default provided, however that a party shall be limited to the recovery of actual damages, each party hereby waives any claim for consequential damages that one party may have against the other. By way of illustration only and not by way of limitation, consequential damages shall include lost profits, lost business opportunities, interference with business or contractual expectancies, loss of equity in property, or any speculative or remote damages. The parties further acknowledge that failure to comply with the terms of this Easement Agreement would cause irreparable damage and money damages may not be sufficient. Therefore, both parties agree that in addition to any other remedies at law or in equity available for breach of this Easement Agreement, the non-defaulting party may seek specific performance or injunctive relief to prevent such damage or further damage.

8.2. **Notice and Cure Period.** In the event of breach or default under this Easement Agreement, no party shall exercise any of its remedies provided herein without first providing the defaulting party with written notice of the default and the opportunity to cure the default. The applicable cure period following the effective date of the default notice for any monetary default shall be ten (10) days. The cure period for non-monetary defaults shall be thirty (30) days provided that if the nature of the default is such that it cannot be reasonably cured within thirty (30) days, the cure period shall be extended for the time reasonably required to cure the default, so long as the defaulting party

commences to cure within thirty (30) days after receipt of the default notice and prosecutes the cure to completion with due diligence.

8.3. No Termination Upon Breach. Notwithstanding any other provision herein, it is expressly agreed that no breach of this Easement Agreement shall entitle any party to cancel, rescind or otherwise terminate this Easement Agreement; provided, however that this provision shall not limit or otherwise affect any other right or remedy which such party may have hereunder by reason of any breach of this Easement Agreement.

**9. Notices.** Notices and other communications under this Easement Agreement shall be in writing and shall be effective when received by personal delivery to the other party, or received via a national overnight delivery service such as FedEx, or received by certified mail, return receipt requested (which receipt shall be deemed to occur five days after mailing), sent by fax with a machine printed or other written confirmation of receipt by the other party, or via electronic mail upon electronic mail reply confirming receipt, in each case to the address or fax number set forth below, directed to the attention of the person identified. Either party may change the address to which notices may be given by giving notice as above provided.

Developer:

The City:

Seattle Department of Parks and Recreation  
Manager, Property and Acquisition Services  
800 Maynard Avenue South; 4<sup>th</sup> Floor  
Seattle, WA 98134-1336  
Fax: 206-233-7038

**10. Complete Agreement.** This Easement Agreement (including the Exhibits hereto) is the entire agreement of the parties concerning use of the Easement Area, and supersedes all prior or contemporaneous writings or discussions relating to the easements and other obligations provided for herein. This Easement Agreement may not be modified except in writing signed by both parties.

**11. Successors and Assigns.** The terms and provisions of this Easement Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, and shall be assigned to any successor in interest to Developer. Upon assignment and assumption of all obligations under this Easement Agreement by the assignee, Developer shall be released from all obligations under this Easement Agreement.

**12. Consent of the City.** Where the consent of the City is required or allowed under this Easement Agreement, the authority to grant such consent shall be vested in the Superintendent of Parks and Recreation; provided that the consent of the Director of DPD shall also be required for any matters relating to compliance with Titles 22, 23, 24 and 25 of the SMC.

**13. Record Notice.** This Easement Agreement shall be recorded with the King County Recorder.

**14. Attorneys' Fees.** In the event of litigation between the parties hereto, declaratory or otherwise, in connection with this Easement Agreement, the prevailing party shall recover its costs and attorneys' fees actually incurred in such litigation, including for appeals, which shall be determined and fixed by the court as part of the judgment.

**15. Applicable Law.** This Easement Agreement shall be construed and interpreted under the laws of the State of Washington. The parties agree that venue of any action between the parties relating to this Easement Agreement shall be in King County, Washington.

**16. Time of the Essence.** Time is of the essence of this Easement Agreement and the performance of all obligations hereunder.

**17. Warranty and Representation of Authority.** The parties each represent to the other that the person or persons executing this Easement Agreement have authority to do so and to bind the parties hereunder. All consents, permissions and approvals related to entry into this Easement Agreement, and the obligations hereunder, have been obtained.

**18. Negation of Partnership.** None of the terms or provisions of this Easement Agreement shall be deemed to create a partnership between or among the parties, nor shall it cause them to be considered joint ventures or members of any joint enterprise. No party shall have the right to act as an agent for another party, unless expressly authorized to do so herein or by separate written instrument signed by the party to be charged.

**19. Singular and Plural.** Whenever required by the context of this Easement Agreement, the singular shall include the plural, and vice versa, and the masculine shall include the feminine and neuter genders, and vice versa.

**20. Severability.** Invalidity of any of the provisions contained in this Easement Agreement, or of the application thereof to any person, by judgment or court order shall in no way affect any of the other provisions thereof or the application thereof to any other person and the same shall remain in full force and effect.



**21. Captions and Capitalized Terms.** The captions preceding the text of each section are included only for convenience of reference. Captions shall be disregarded in the construction and interpretation of this Easement Agreement. Capitalized terms are also selected only for convenience of reference and do not necessarily have any connection to the meaning that might otherwise be attached to such term in a context outside of this Easement Agreement.

**22. Non-Waiver.** The failure of any party to insist upon strict performance of any of the terms, covenants or conditions hereof shall not be deemed a waiver of any rights or remedies which that party may have hereunder or at law or equity and shall not be deemed a waiver of any subsequent breach or default in any of such terms, covenants or conditions.

**23. No Merger of Estates.** This Easement Agreement shall not extinguish or terminate by operation of the doctrine of merger or otherwise due to the existing or future common ownership of any of the real property described herein.

**24. Recreational Use.** The parties acknowledge that the use of the Easement Area by the public as permitted herein is intended for the recreational use of the public, shall not be subject to a fee, and shall be subject to RCW 4.24.210.

[END OF TEXT ON THIS PAGE]

**Exhibit List**

Exhibit A: Developer Property Legal Description  
Exhibit B: Easement Area Legal Description  
Exhibit C: Open Space Improvements  
Exhibit D: No Build Area Depiction

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

[Developer entity], a \_\_\_\_\_  
limited liability company

By: \_\_\_\_\_

Its

**THE CITY OF SEATTLE**, a  
Washington municipal corporation

By: \_\_\_\_\_

Its

STATE OF \_\_\_\_\_ )  
 : ss.  
COUNTY OF \_\_\_\_\_ )

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of \_\_\_\_\_, **LLC**, a \_\_\_\_\_ limited liability company, to be the free and voluntary act of such limited liability company for the uses and purposes mentioned in the instrument.

Dated this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Signature of Notary]

\_\_\_\_\_  
[Print Name of Notary]

Notary Public in and for the State of \_\_\_\_\_,  
residing at \_\_\_\_\_.  
My commission expires: \_\_\_\_\_.

STATE OF WASHINGTON )  
 : ss.  
COUNTY OF KING )

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of **The City of Seattle**, a Washington municipal corporation, to be the free and voluntary act of such corporation for the uses and purposes mentioned in the instrument.

Dated this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Signature of Notary]

\_\_\_\_\_  
[Print Name of Notary]

Notary Public in and for the State of  
Washington, residing at \_\_\_\_\_.  
My commission expires: \_\_\_\_\_.

DRAFT

|

**EXHIBIT A**

**Developer Property Legal Description**

DRAFT

|

**EXHIBIT B**

**Easement Area Legal Description**

DRAFT

**EXHIBIT C**

**Open Space Improvements**

See attached

DRAFT

**EXHIBIT D**

**No Build Area Depiction**

See attached

DRAFT